IN THE HIGH COURT OF JUDICATURE AT BOMBAY

TESTAMENTARY AND INTESTATE JURISDICTION

MISCELLANEOUS PETITION NO.26 OF 2006

IN

SUIT NO.51 OF 1994

IN

PETITION NO.238 OF 1994

1.Smt.Indira Narayan Shet & others. ...Petitioners

vs.

1. Ramesh Srinivas Raykar & others. ...Respondents.

Mr.V.A.Thorat with R.M.Pande i/b. R.P.Ojha, for Petitioners.

Mr.A.Y.sakhare i/b. Suresh Dubey, for Respondent no.2.

Mr.D.D.Madan i/b. D.K. Ailawady, for Respondent nos.3 to 12.

CORAM: D.K.DESHMUKH,J.

DATED: 15th February, 2007.

P.C.:-

1. On the basis of the averments made in the petition and the report submitted by the office dated 31.1.2007, following can be taken as admitted position:-

(i) The petition no.238 of 1994 was filed by one Mr.Krishna Manjunath Raykar for probate of the Will left behind by Smt.Sushila Manjunath Raykar. The petitioners in that petition stated that he is an executor named the Will. In that petition three caveats were filed. They were filed by (i) Vishwanath Manjunath Raykar, (ii) Smt.Indira Narayan Shet and (iii) Smt.Shakuntala Subhash John. As a result of filing of the caveats in the probate petition, the petition was converted into a Civil Suit. The name of one caveator, however, was added in the petition as defendant i.e. Vishwanat Manjunath Raykar. It appears that the original petitioner Krishna died on 18.8.1997. But in the civil suit no application was made for substitution of the plaintiff.

(ii) It appears that the consent terms were filed before the Court in the month of March,1999. They were signed by Mr.Bhaskar Manjunath Raykar, Vishwanath Manjunath Raykar (one of the caveators), Mr.Ganesh S.Raykar, Raju K.Raykar and Smt.Sumitra (they appear to be the legal heirs of the original petitioner Krishna Raykar). In those consent terms in paragraph (1) it is stated that the original petitioner Krishna died on 18.8.1997. The abatement of the petition is set aside and in his place Bhaskar Manjunath Raykar is substituted as plaintiff/petitioner being second executor named in the Will.

(iii) By the consent terms, the Caveator Vishwanat M.Raykar

withdrew his caveat. The Court on 19.3.1999 disposed of the petition in terms of the consent terms at "X".

2. The present petition has been taken out by the other two caveators namely Smt.Indira and Smt.Shakuntala for setting aside the order passed by the Court on the basis of the consent terms.

3. According to the office report, because of the mistake committed by the office of this Court, names of the petitioners who had filed caveats were not shown in the body of the plaint as defendants-caveators. Therefore, it is obvious that the Court while passing the order in terms of the consent terms was not aware that there are other persons who have filed the caveats, and thus, the order disposing of the petition in terms of the consent terms came to be passed in denial of right of hearing to the petitioners. The order passed in terms of the consent terms not only disposes of the petition in terms of the consent terms, but also set aside the abatement of the petition and permits substitution of Bhaskar as the petitioner.

4. Taking overall view of the matter therefore, in my opinion, the following order would meet the ends of justice:-

(i) The order passed by the Court dated 19.3.1999 in Testamentary petition no.238 of 1994 is set aside.

(ii) The learned Counsel appearing for Mr.Bhaskar Raykar who claims to be the second executor named in the Will i.e. the present respondent no.12 states that within four weeks from today he will make an application for setting aside the abatement of the petition and for bringing himself on record as petitioner. The statement is accepted.

(iii) As Mr.Vishwanath Raykar has filed the consent terms, the caveat filed in the petition by Mr.Vishwanath Raykar i.e. the present respondent no.11 is removed. It is clarified that now there will be only two caveators in this petition viz. Smt.Indira and Smt.Shakuntala.

(iv) In case Mr.Bhaskar-respondent no.12 does not move an application for setting aside the abatement of the petition and for bringing himself on record as petitioner, the office shall treat the testamentary petition no.238 of 1994 as disposed of and shall proceed further.

(v) It is clarified that in case the abatement of the petition is set aside by the Court and substitution of the petitioner is permitted, the petitioner will be at liberty to move the Court seeking order in terms of the consent terms.

(vi) Needless to say, at that juncture the Court will hear this application after granting an opportunity of being heard to all the parties.